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IN THE

Supreme Court of the United States

OCTOBER TERM, ——

No. 78-1840

CITY OF ROME, BRUCE HAMLER, and H. F. HUNTER, JR.,
Appellants,

v.

UNITED STATES OF AMERICA, GRIFFIN B. BELL, Attorney General of the United States, and DREW S. DAYS III, Assistant Attorney General of the United States,
Appellees.

On Appeal From the United States District Court for the District of Columbia

BRIEF OF THE STATE OF MISSISSIPPI AS AMICUS CURIAE

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BRIEF OF THE STATE OF MISSISSIPPI AS AMICUS CURIAE

This brief is submitted pursuant to the privileges granted a State through its Attorney General under Supreme Court Rule 42(4).

QUESTION ADDRESSED

The State of Mississippi confines its presentation as *amicus curiae* to discussion of the questions of whether

this Court (a) should reverse its prior decisions upholding generally the constitutionality of 42 U.S.C. 1973c (1970) [hereinafter Section 5 of the Voting Rights Act], or (b) having extended the scope of Section 5, as presently applied in the wake of judicial determinations and administrative misapplications based upon this Court's precedents, it has become unconstitutional.

INTEREST OF THE STATE OF MISSISSIPPI

As one of the jurisdictions covered by the Voting Rights Act of 1970, as amended, the State of Mississippi *qua* State, and with regard to its component political subdivisions, has a significant and continuing interest in the current status of the constitutionality of Section 5 of the Act. Mississippi supports the position adopted by the City of Rome with regard to the construction of the phrase "does not have the purpose and will not have the effect," with respect to the triggering mechanism for Section 5.

Under Section 5, State interests have been subjected to significant apprehension as a result of this Court's interpretation of the scope and extent of that section's operation. The State of Mississippi has found through years of litigation in the federal courts, that under Section 5 there exists a statutory right without an effective judicial or administrative remedy. This would likely be the case even if the provisions of the Voting Rights Act were confined to the evident plain meaning of the words of the statute. But compounding the interpretations of federal courts at all levels, is the application by the Department of Justice of its own interpretation of those various court decisions. These Departmental interpretations are further complicated by

its own application of intra-Departmental policies and procedures in the operation and execution of the provisions of Section 5. The result is that all covered jurisdictions, from that of a sovereign State down to the smallest school district, must traverse a maze of finite approval stages within the Department or the federal courts. Even if officials at these levels have access to clear and undisputed facts in each case, the prospective variables of ignorance, mistake and plain misfeasance at the administrative level cause the application of Section 5 of the Voting Rights Act to fall before the constitutional requirement of "appropriateness" under Section 2 of the Fifteenth Amendment.

For these reasons, because Mississippi has an interest in protecting its inchoate authority as a State in the orderly operation of state and local government and in future litigation in federal courts at all levels, it presents this supportive brief in the present action.

STATEMENT OF THE CASE

As a local jurisdiction covered under Section 5 of the Voting Rights Act, the City of Rome, pursuant to that provision's preclearance requirement, sought approval by the Attorney General of the United States to effectuate certain changes in its City Charter. These changes included the creation of a seemingly simple majority vote requirement for the City Commission and the Board of Education elections, along with the creation of numbered posts for those elections; the establishment of ward residency requirements for the Board of Education elections only; and the institution of staggered terms for both the City Commission and the Board of Elections. JURISDICTIONAL STATEMENT 5-6. In one form or another, the Attorney General inter-

posed objections to all of these changes on two separate occasions in 1975 and 1976. The City then filed a 42 U.S.C. 1973b [Section 4] action seeking a declaratory judgment in the District Court for the District of Columbia. The sum and substance of that court's holding was that while the City was found to have acted without invidious "purpose," it was nevertheless found to have an *unintended* effect adverse to the class of voters protected by the Voting Rights Act. Appeal lies directly to this Honorable Court pursuant to 42 U.S.C. 1973b(a) and 42 U.S.C. 1973c. *Id.* 7-9.

SUMMARY OF ARGUMENT

The State of Mississippi seeks to persuade this Court to reconsider its decision in *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966), finding Section 5 of the Voting Rights Act of 1965 to be constitutional within the ambit of the Enforcement Clause of the Fifteenth Amendment. For the reasons urged in separate and dissenting opinions since that case, it has now become clear that Section 5 of the Voting Rights Act is and always has been unconstitutional. Its threshold violation is of the fundamental principle of federalism inherent in our constitutional system. The vesting of authority in a single individual to effectively veto the operations of an integral component of this Federal Union is to reduce the States to colonial or palatinate status. This is a direct contravention of the Guarantee Clause of Article IV, Section 4 of the United States Constitution. There, in point of fact, the affirmative duty is placed upon the central government to preserve and guarantee republican government, rather than create statutory and administrative barriers to its orderly function.

Assuming *arguendo* that Section 5 of the Voting Rights Act is not unconstitutional on its face, it has become unconstitutional as applied pursuant to its piecemeal interpretation by federal courts at all levels, and by the arbitrary, capricious and ofttimes malpracticed administration by the Department of Justice. From the initial decisions by this Court applying the Act's remedies to state and federal elections, to those decisions extending its administrative guidelines to the smallest political component in the covered States, the statutorily-required preclearance procedures have burgeoned into incredible complexity and delay. The procedures comprehended in the language of the Act itself, from the sixty-day submission period to *de novo* proceedings before an independent three-judge federal tribunal, have resulted in litigatory and financial burdens which no right-thinking legislator could have intended for Section 5 to have visited upon the covered jurisdictions. Certainly the lengths to which the courts and the Department of Justice have required these jurisdictions to go in order to exercise even the most basic electoral and governmental powers cannot any longer be said to be "appropriate" under the Fifteenth Amendment.

This is especially clear since both Mississippi, and the City of Rome, Georgia (and, indeed, along with the South in general) have, in the thirteen years since the initial findings regarding the constitutionality of Section 5, experienced dramatic social, economic and political changes. This positive progress has resulted in making Section 5 superfluous at best and an administrative burden at worst for the free and unfettered access to the very electoral system it was designed to enhance and facilitate to begin with.

Finally, Mississippi emphasizes the inherent authority of this Court to reverse itself, especially where constitutional rulings are concerned. Not only is it within the Court's endemic authority to override precedent, but it also becomes its duty to do so where the passage of time clearly establishes the need to act in the Court's continuing protection of our Constitution as the organic law of the nation.

For these and other reasons elucidated herein, Mississippi supports the City of Rome's application for reversal of the judgment below.

I. Section 5 of the Voting Rights Act Is and Always Has Been Unconstitutional.

In much the same way as the first Mr. Justice Harlan in dissent anticipated the true meaning of the Equal Protection Clause of the Fourteenth Amendment in *Plessy* v. *Ferguson,* 163 U.S. 537, 559-560 (1896), so too was Mr. Justice Black incisively aware of the prospective impact of the operation of Section 5 of the Voting Rights Act on constitutional government in the United States. In the central case at issue here, *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966), upholding the constitutionality of Section 5, Mr. Justice Black filed what has come to be a classic dissent. Protesting against the justiciability of the issue to begin with, and concerned about the further liquidation of the Guarantee Clause, Justice Black objected that the mendicant requirement of Section 5 "so distorts our constitutional structure of government as to render any distinction drawn on the Constitution between State and Federal power almost meaningless." *Id.* at 358. In a central government of delegated powers, he argued, if the "reserve[d] . . . powers to the

States are to mean anything, they mean at least that the States have the power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them." *Id.* at 359. With astonishing prescience for the bureaucratic functioning of the Section 5 requirements, he noted through experience that, "I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in far away places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces." *Id.* at 359-360. He also noted the tendency toward the inevitable delegation and dispersion of power within a Section 5 type preclearance apparatus. With that delegation traditionally goes a dissipation of care and expertise in administrative decisions. Justice Black concluded that, "It is inconceivable to me that such a radical degradation of State power was intended in any of the provisions of our Constitution or its Amendments." *Id.* at 360. *Cf.* the dissenting opinion of Mr. Justice Harlan earlier in *Wesberry* v. *Sanders,* 376 U.S. 1, 38 and 48 (1964).[1]

Over the next seven years there was a steady expansion of the scope of Section 5 preclearance authority. When in 1973, the Court ruled in *Georgia* v. *United States,* 411 U.S. 526 (1973), that Section 5 preclearance requirements applied to the reapportioning of entire State legislatures, Mr. Justice Powell, in a vig-

[1] As is elucidated in greater detail in Argument II below, at p. 14, the inexorable operation of Parkinson's Law with regard to Section 5 of the Voting Rights Act has become all too grim a reality.

orous dissent, reasserted the constitutional objections voiced by Justice Black. In the *Georgia* case, Justice Powell agreeing with Mr. Justice White, objected to the extension of Secton 5 upward to incorporate the fundamental electoral partitioning of an entire State. It was, he said, "a serious intrusion, incompatible with the basic structure of our system for federal authorities to compel a State to submit its legislation for advance review." *Id.* at 545 (footnote omitted).

It is, of course, fundamental that Congress has the power to implement protective voting rights legislation pursuant to the "appropriate legislation" license of the Enforcement Clause of the Fifteenth Amendment. That authority, however, while plenary, is neither absolute nor arbitrary. All segments of the Constitution operate in harmony with all other segments, and federal authority to regulate guarantees as to voting rights must conform with authority reserved to the States to manage their own poliitcal affairs. Fundamental to those reserved rights is the authority of State legislatures, again within the context of constitutional confines, to pass State laws. As with all federal enactments, those laws have the full leeway of "necessary and proper" legislation. *Maryland* v. *Environmental Protection Agency,* 530 F.2d 215, 225 (4th Cir. 1975). This Court has long devoted careful concern to the protection of "functions essential to the separate and independent existence of the component members of the federal union." *Lane County* v. *Oregon,* 74 U.S. (7 Wall.) 71 (1869); *see also Texas* v. *White* 74 U.S. (7 Wall.) 700 (1869). While cross-currents of American society may change the focus of legislative and judicial attention in response to the needs of the body politic, a State is not a mere factor in the "shifting

economic arrangements" of society, *Kovacs* v. *Cooper,* 366 U.S. 77, 95 (1949), but is, instead, a coordinate element in our constitutional system. That system will not allow "the National Government [to] devour the essentials of State Sovereignty." *Maryland* v. *Wirtz,* 392 U.S. 183, 205 (1968) (Douglas, J., dissenting).

This Court, in a recent consideration of the traditional means and substantial needs of the structures of State and local governments, has ruled that notwithstanding a broad basis for the Federal Government's constitutional power (e.g., the Commerce Clause), Congress may not exercise that power in a fashion which "would impair . . . the States' 'ability to function effectively in a federal system.'" *National League of Cities* v. *Usery,* 426 U.S. 833, 852 (1976). There the Court held that a federal statute, constitutional on its face, was infirmly applied under the conditions as they existed at that time. "We hold that insofar as the challenged amendments operate to directly displace the State's freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress . . . ." *Id.* at 852. The Court further observed that a situational over-extension of Congress' authority to withdraw from the States the power to make fundamental intrastate decisions would leave little of the States' "'separate and independent existence'" *Id.* at 851. *See also Coyle* v. *Oklahoma,* 221 U.S. 559, 580 (1911).

The seemingly plenary power of the Enforcement Clause of the Fifteenth Amendment has thus provided a wellspring, feeding a vast reservoir of federal statutory authority in dealing with civil rights legislation. This case is confined to the dredging of merely one

estuary, Section 5 of the Voting Rights Act. *See* JURISDICTIONAL STATEMENT 5-9.

The central philosophy in upholding Section 5 as "an uncommon exercise of constitutional power," was the Court's conclusion "that exceptional conditions can justify legislative measures not otherwise appropriate" under the Constitution. 383 U.S. at 334.[2] If this constitutional philosophy is to be accepted, it must necessarily, therefore, work both ways. If the *Katzenbach* premise that extraordinary times such as the early years of the Civil Rights Movement, can produce constitutionally permissive federal legislation to deal with extraordinary civil rights deficiencies, it is also logical to conclude that changes in those conditions for the better may abate the constitutional operation of that legislation. If, therefore, the enforcement provisions of the Civil War Amendments are operative as corrective devices under the Constitution in order to insure proper access to equality for minority citizens in all phases of American social, economic, and political life, that same liberality of interpretation must also take cognizance of the turning of the seasons wherein the desired fruit has been borne and harvested. In short, the very methodology which, during a previous era became vital to the acquisition of access to the political process can—and we submit has—become an obstacle to the participatory government which it was intended to promote.

[2] We do not here dwell on the argument, but merely advert in passing to previous rulings on this precise point. This "exceptional conditions" proposition arose in more trying times in *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935). There the Court in a landmark pronouncement ruled that, "Extraordinary conditions may call for extraordinary remedies [but] . . . extraordinary conditions do not create or enlarge constitutional power." *Id.* at 528.

"Appropriateness," therefore, must be considered within the context of the Constitution as it exists today.[3] Justice Powell had serious misgivings about the appropriateness of Section 5 in *Georgia* v. *United States, supra,* six years ago. While acknowledging congressional power to enact "appropriate legislation" in necessitous circumstances, he expressed "disagreement . . . with the unprecedented requirement of advance review of State or local legislative acts by federal authorities, rendered all the more noxious by its selective application to only a few States." 411 U.S. at 545, note.

Central to this case, therefore, is the contention of the City of Rome, supported by the State of Mississippi, that legislation, which under the Fifteenth Amendment was found to be constitutional and appropriate under circumstances existing thirteen years ago, can no longer be upheld on that basis due to both the very success of the legislation and the dramatic changes which were symbiotic to it. Under these conditions, both the legislation and its judicial adhesion, have, in fact, outlived the utilitarian purposes for which they were at that time intended.

In this regard, judicial analogy has been drawn between the Elastic Clause of Article I and the Enforcement Clause of the Fifteenth Amendment. *See United States* v. *State of Louisiana,* 225 F. Supp. 353, 360 (E.D. La., 1963). But this analogy standing alone—even without the fresh viewpoints of modern social and

[3] Indeed, even the precipatory case of *Brown* v. *Board of Education,* 347 U.S. 483 (1954) found that the Civil War Amendments must be viewed in their "*present* place in American life throughout the Nation." (emphasis added) *Id.* at 492 493.

political developments—cannot bear the full weight of constitutional imprimatur. If any analogy is to be drawn, it should be one which emphasizes the composition of two separate and vital elements in this parallel, i.e., that "appropriate" legislation not only conform to the denotation of that term, but also that it meet the separate requirements of being both *"necessary"* and "proper." Appellants and *amicus* contend that Section 5 no longer meets the constitutional requirement of these parameters. These results obtain essentially because of the dramatic changes in Southern political life since the inception of Section 5 remedies. They also contend that Section 5 in particular has reached the limit of its productivity under the Constitution and therefore should be pruned from the corpus of federal constitutional law so as to allow the continued organic growth of democratic participatory government in the States affected.

To begin with, the primary intent of the Voting Rights Act, dramatic increase in Black voting registration, has become a *fait accompli* in every Southern State.[4] The electoral consequences of this dramatic increase were inevitable, and blacks now hold more offices in the Southern States than in any other region in America.[5] This proportion of minority leadership is al-

[4] The biggest gains have been in Mississippi, where black registration went from 6.7% to 59.8%; in Georgia the black percentage went up from 27.4% to 52.6%. Overall, by 1969, black registration had quadrupled in the States covered by the Voting Rights Act. J. Hanus, et al., The Voting Rights Act of 1965 as Amended: History, Effects, and Alternatives (CONGRESSIONAL RESEARCH SERVICE, June 17, 1975, *revised* November 19, 1975) [hereinafter, LEGISLATIVE HISTORY].

[5] The latest statistics on black elected officials are reflective of the saturation effect of the Voting Rights Act itself. As of July 1978, there was a total of 4,503 black elected officials in the United States.

most certain to be significantly increased as a result of the implementation of the most recent legislatively enacted reapportionment plan approved for the State of Mississippi by a three-judge federal court for the District of Columbia under the Section 5 court alternative preclearance provision of the Voting Rights Act, *Mississippi* v. *United States,* Civ. No. 78-1425 (D.D.C., June 1, 1979), *motion for stay denied* in *Henry, et al.* v. *Mississippi,* No. A-1067 (S.Ct., June 18, 1979);[6] and doubtless also by both Mississippi's and Georgia's 1980 legislative reapportionment. These statistics conform to the plain meaning concept of the law and are immensely illuminating with regard to the dramatically changed political conditions in the States covered by Section 5.

Nor are the benefits of these dramatic gains likely to suffer retrenchment as a result of the overruling of this Court's decision in *South Carolina* v. *Katzenbach,* viz Section 5 of the Voting Rights Act. There remain a plethora of legal, statutory and equitable remedies available to private plaintiffs with the eager assistance of the Department of Justice and all its many resources in the continued maintenance and protection of all man-

The eleven Southern States account for 2,230 or 55.7% of them. Mississippi ranks second in the nation in the total number of black elected officials (303), while Georgia ranks sixth in the nation (228). Georgia ranks second in the nation in the number of black elected officials holding *two* offices (3). Mississippi and Georgia alone account for 11.8% of the total black elected officials in the United States. Joint Center for Political Studies, NATIONAL ROSTER OF BLACK ELECTED OFFICIALS ix-x (1978).

[6] A black State Senator, the first in modern Mississippi history, was elected in a special election called by the U.S. District Court for the Southern District of Mississippi in a district whose configuration is nearly identical to the Senate District approved in *Mississippi* v. *United States. Id.*

ner of civil rights under the Thirteenth, Fourteenth and Fifteenth Amendments. *See Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968) (these Amendments operate to strip away all "badges and incidents of slavery"). Moreover, public interest groups, political leadership, and more especially black leadership in elected and appointed positions of public trust and power, in the South would prevent any regression to the practices of a previous era.

Thus, in view of the burdensome consequences attending the passage and sustaining of Section 5 of the Voting Rights Act, its constitutionality ought to be reconsidered in light of the fifteen years of experience and practice since its enactment. It is our view that if the Court were now to undertake such analysis, it would find that what seemed to many an incursion on the constitutional rights of the States which may have been justified under the concept of a "living Constitution," is no longer required.

II. Assuming Arguendo That Section 5 of the Voting Rights Act Is Not Unconstitutional On Its Face, It Has Become Unconstitutional As A Result Of Judicial Determination and Administrative Misapplication.

This Honorable Court has previously upheld the constitutionality of the enactment of the Voting Rights Act and its Section 5 preclearance mechanism, *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), and its amendments, *Oregon* v. *Mitchell*, 400 U.S. 112 (1970). In addition, this Court has been called upon on numerous other occasions to deal with the applicability of Section 5 in particular to various situations and units of government in the affected States. On separate occasions this Court has held that the broad purview of Section 5 encompasses electoral activity in congressional districts, *Lucas* v. *Rhodes*, 389 U.S. 212 (1967); local units of government, *Avery* v. *Midland County*, 390 U.S. 474 (1968); activities of citizens as private attorneys general, *Allen* v. *Board of Elections*, 393 U.S. 544 (1969); selection of presidential electors, *Moore* v. *Ogilvie*, 394 U.S. 814 (1969); the impact of educational levels on the electoral process, *Gaston County* v. *United States*, 395 U.S. 285 (1969); the shift to at-large municipal elections, *Perkins* v. *Matthews*, 400 U.S. 379 (1971); state reapportionment plans, *Georgia* v. *United States*, 411 U.S. 526 (1973); at-large county elections, *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976); municipal subdivisions, *United States* v. *Board of Commissioners of Sheffield*, 435 U.S. 110 (1978); and participation of public personnel in elections, *Dougherty County Board of Education* v. *White*, —— U.S. ——, 99 S.Ct. 368 (1978).

Appellants and *amicus* submit that this piecemeal interpretation of Section 5 has spread its intended force and effect over an area well beyond that intended by Congress or manageable by those in the Department of Justice responsible for executing these decisions. Our position conforms to that of Mr. Justice Powell in his dissent in *Dougherty County Board of Education* v. *White*, where he averred that, "The Court's ruling is without support in the language or legislative history of the [Voting Rights] Act." His conclusion was that, "Indeed, if the Court truly means that any incidental impact on elections is significant [enough] to trigger the preclearance requirement of § 5, then it is difficult to imagine what source of state and local enactments

would *not* fall within the scope of that section." —— U.S. at ——, 99 S.Ct. at 380. (footnotes omitted)[7]

The philosophical premises of our judicial system, of course, allow an appellate court to review statutory law only by chance, when litigation happens to arise in the accusatorial process. The necessitous installment interpretation of Section 5 has nonetheless had an adverse and unfortunate effect not only on the purpose of the Voting Rights Act itself, but also on the confluent operation of the two tiers of the federal system. These situational interpretations of the applicability of the coverage of Section 5 have resulted in the fragmenting of the powers of federalism and their absorption in the vacuum of centralized authority. Nonetheless, all of the political entities within and including the States covered by the Section 5 preclearance requirements have, pursuant to this Court's decisions, been forced to shoulder a burden which increases geometrically in proportion to a political subdivision's inability to sustain it. The result is that the smaller the governmental unit captured by Section 5, the greater its proportionate burden in bearing up under the judicial and administrative burdens. As already noted, *absent* Section 5 preclearance procedures, political minorities would still

[7] Speaking in a footnote to the question of the constitutionality of Section 5, Justice Powell's dissent adverted to the fact that in addition to himself—he cited his previous dissent in *Georgia* v. *United States*, 411 U.S. at 545—"Other Members of this Court have also expressed misgivings about the constitutionality of Section 5." In addition to referring to Mr. Justice Black's dissenting views in *South Carolina* v. *Katzenbach*, in 1966, 383 U.S. 301, 358, he also cited Justice Harlan's concurring and dissenting opinion in *Allen* v. *State Board of Elections*, 393 U.S. 544, 586 (1969), and Chief Justice Burger's concurring opinion in *Georgia* v. *United States*, 411 U.S. 526, 545 (1973). —— U.S. at ——, 99 S.Ct. at 377, n. 1.

retain a multiplicity of remedies in order to protect their rights. But with the *continued* interference of the administrative requirements of Section 5, States and their component political subdivisions are technically given administrative and judicial appeal rights but realistically denied them in the ensuing process.

Section 5, as it stands today, therefore, provides the States with a technical right without an effective remedy. It does not strain the concept of this Court's power of judicial notice for it to take cognizance of Mississippi's experiences with Section 5. Mississippi is economically a poor State composed of political subdivisions whose economic resources are relatively meager. Yet their experiences with Section 5 are not untypical. The operation of both the administrative and litigatory alternatives of Section 5 has the inevitable effect of requiring the smallest governmental entity to match its resources with the largest, the Federal Government. Not only for the State, but also for its smaller municipalities, its poorer counties, and independent entities such as boards of trustees of hospitals and other municipal corporations, the functional requirements of the "Washington experience" with Section 5 is prohibitory. The retention of D.C. counsel required under the local rules, the expenses involved in the location, transportation, and testimony of witnesses, and the sustaining of all other expenses attending a one- to two-week trial in the District of Columbia—not to mention an appeal to this Honorable Court—are so far beyond the capacity of governmental units such as the City of Rome and cities and towns similarly situated in *Mississippi* as to strain the credulity of even the most optimistic litigant. Indeed, in more instances than perhaps even this Court is aware, various governmental units

simply allow a Department of Justice's arbitrary objection to stand for the simple reason that in the overall scheme of things, selectivity in pursuing the appeal requires that smaller issues must be allowed to fall before the Department's *fiat*. In sum, the covered States and their subdivisions are being required to weigh issues, not on the basis of their legality or constitutionality, but rather on the basis of whether or not they can afford to make a point of exercising their constitutional rights. If anything could be found to be more objectionable than local government by federal interdiction, it must be local government by federal default. Thus by the operational effect of this Court's interpretations of Section 5, it has, while technically recognizing States' rights under Section 5, effectively cut off the remedies of smaller subdivisions within those States to appeal.

Faced with these insurmountable difficulties, the covered States have been forced to accept as a fact of life that the Department of Justice may use Section 5 as a sword as well as a shield. Under current Court decisions—as well as the Department of Justice's own interpretations of them—the implementation of Section 5 goes beyond mere Departmental approval or disapproval of a prospective change in local election laws, and is used instead to usurp the daily operation of local government. In Mississippi's experience, for example, before a small Mississippi community could be allowed to change the office of Chief of Police from an elected to an appointed position, the Department of Justice required the town officials to stipulate in advance who would be appointed to the office. The same kind of overt *political* negotiations have also been required in instances from the seemingly innocuous annexation of land for future town development to the De-

partment's selective approval of proposed legislation so that vital parts have been discarded while precatory provisions have been allowed to stand useless by themselves. Finally, with regard to the conflicting interpretations of Section 5, the Attorney General of Mississippi, on at least one occasion, has had to issue separate and conflicting opinions for the Northern District of Mississippi, under one court's interpretation, and for the Southern District of Mississippi under another, for the same statewide election.

This undue, and we believe unconstitutional, operation of Section 5 comes from the hands of an integral Department of the federal government which, under the Constitution, has an affirmative duty to protect and guarantee republican government, rather than interpose barriers to it. Functional consequences make elections almost impossible in the covered States. Mississippi has not been able to restructure its election laws for 15 years, since November 1, 1964. During that time the State's Attorney General has had to constantly build bridges between laws as enacted, statutes as approved by the Justice Department, and the situations as they have actually existed during election years. Over the years those bridges have become more and more precarious in their underpinnings and consequently have become constitutionally and legally unsafe for the support of the voting rights of *all* the citizens of the State.

It is our contention, therefore, that when the absence of rights varies inversely to available remedies, any statute requiring conformity with such a process is unconstitutional. As Mr. Justice Stone consistently pointed out, "The Constitution, viewed as a continuously operative charter of government, is not to be in-

terpreted as demanding the impossible or the impracticable." *Opp Cotton Mills* v. *Administrator,* 312 U.S. 126, 145 (1941) and *Yakus* v. *United States,* 321 U.S. 414, 424 (1944). *See also* his opinion in *Hirabayashi* v. *United States,* 320 U.S. 81, 104 (1943).

Under Section 5 as it exists today, all covered States and their subdivisions, no matter how small in size, and all electoral issues, no matter how seemingly remote to the electoral process, must be submitted to the expensive legal, litigatory, and lugubrious burden of going to Washington, D.C. to appeal procedurally to the Attorney General of the United States but in reality to his subordinates, or in the alternative to an increasingly burdened federal district court there. In such a system it is not uncommon that "an erroneous judgment may stand, and acquire an undeserved authority, merely because the losing party does not appeal against it—usually for the excellent reason that he can't afford any further costs of litigation." C. Allen, LAW IN THE MAKING 298 (1958).

As already noted,[8] this Court's standing precedents now require any governmental unit to bear this expensive, time consuming, and immensely frustrating burden for all aspects of the electoral process in each and every State subdivision. But this Court has also recently taken judicial notice of a similar process with respect to the burdens of federal legislation on local participation in commerce. "Quite apart from the substantial costs imposed upon the States and their political subdivisions," the Court noted of that federal statute, "[it] displaces State policies regarding the manner in which they will structure delivery of those

[8] See *supra* pages 14-15.

governmental services which their citizens require." *National League of Cities* v. *Usery,* 426 U.S. at 847.

The operational burden of Section 5 has, at long last, come to that point in the history of this nation where it should be allowed to collapse of its own weight. In addition to the litigatory maze which any party from State to county to municipality to school board must thread, the administrative anthill of Section 5 preclearance submissions in the Attorney General's office has so leavened the quality of the administrative process as to place it beyond the ken of even the most conscientious public servant. As a direct result of this Court's previous rulings and the Attorney General's interpretation of them, the processing of these submissions has become an increasingly burdensome task for the Department of Justice.[9]

Moreover, the increased burden on the Department of Justice indisputably has had the effect of lowering the quality of attention the Attorney General and his staff can give to submissions. Whatever the jurisdic-

[9] Shortly after the passage of the Voting Rights Act, the number of submissions was negligible, averaging only about 65 per year for the first five years of the Act's existence. Of these, the Department objected to only 19 or about 5.9%. After this Court's initial rulings on the expansive nature of Section 5 *per se,* however, especially in *Allen* v. *State Board of Elections,* 393 U.S. 544 (1969), submissions increased from 255 in 1970 to 1,118 in 1971. By 1974, the total submissions had increased to 3,929. By then the Attorney General's proportionate rate of objection of 4% to 6% was resulting in a countermanding of electoral laws in about 180 cases per year. LEGISLATIVE HISTORY at 56-57. This discussion of the burdens of the administrative route under Section 5, however, is in no way meant to defer to any purported desirability of the alternative Section 5 route of litigation. See JURISDICTIONAL STATEMENT at 27.

tion, this process still requires massive amounts of man hours, legal fees, and political negotiations to produce. Indeed, this Court took judicial notice of the fact that under such conditions "the Department of Justice does not have the resources to police effectively all the States and subdivisions covered by the Act." *Perkins* v. *Matthews,* 400 U.S. 379, 396 (1971).

The inevitable result, despite the terms of the Act, is that the Attorney General must delegate to the lowest echelons of his Department, a federal statutory power of the broadest implications and results for the sovereign States of this Union and their citizens.[10] There is at least some doubt, however, as to whether the Voting Rights Act, by analogy to other federal legislation of the same era, even allows the Attorney General to delegate this authority beyond the top level of the Department of Justice. In an action based on the Omnibus Crime Control Act of 1968, this Court concluded that Congress did not intend a similar power on the criminal side to be exercised by "any individual other than the Attorney General or an Assistant Attorney General specially designated by him." *United States* v. *Giordano,* 416 U.S. 505, 508 (1974). There the Court found that the exercise of federal statutory power in a constitutionally sensitive area required "[t]he mature judgment of a particular responsible Department of Justice official [to be] . . . interposed as a critical precondition to any judicial order." *Id.* at 515-516.

[10] In at least one major case, the Attorney General literally could not make up his mind within the sixty days whether or not a jurisdiction's proposed action was objectionable. Rather than "take the chance" he therefore interposed a *nunc pro tunc* objection just to be "safe." While that action was disallowed by this Court, *Morris* v. *Gressette,* 432 U.S. 491, 507 (1977), that attempt by the Department of Justice demonstrates a disposition in the administration of the Act of a philosophy of presumptive and almost reflexive rejection. *See also City of Richmond* v. *United States,* 422 U.S. 358, 362 (1975). Early on, Mr. Justice Powell foresaw such a difficulty and was insisting in dissent that, "As a minimum, assuming the constitutionality of the Act [itself], the Attorney General should be required to comply with it explicitly and to invoke its provisions only when he is able to make an affirmative finding." *Georgia* v. *United States,* 411 U.S. at 545. *See also* the opinion by White, Powell and Rehnquist, J.J., in the same case that the Attorney General "should not be able to object by simply saying that he cannot make up his mind or that the evidence is in equipoise." *Id.*

But the level to which this decision-making process under Section 5 has devolved was astonishingly demonstrated in Mississippi's most recent administrative experience with the Department of Justice. There the functional decision to interpose an objection to Mississippi's entire statewide reapportionment plan—the same plan which was recently upheld on appeal in the judicial alternative—was left to the discretion of a second-year law student who was a paralegal on the Voting Rights staff and who had no substantive expertise in the field. *See* Defendant's Brief in *Connor, et al.* v. *Coleman, et al.,* No. 78-1013 (S.Ct., October Term, 1978), at 19, n. 15, and its Appendix at D-44. *See also* the Appellee's Brief in Response to Opposition to the Application for a Stay Pending Appeal in a companion case, *Henry, et al.* v. *State of Mississippi,* (S.Ct., October Term, 1978), at 15 n. 42. The State of Mississippi as *amicus* submits that it could never have been the intent of the Congress of the United States that one of the States of the Union or any of its political subdivisions should receive this kind of negligible attention to the expensive and painstakingly crafted efforts of an entire State legislature and administration, or

if it did so intend, this Court should never stand for it."

The declivity of administrative quality current under Section 5 is all the more distressing in view of the fact that the decisions of the Department of Justice and its Voting Rights Section are not only traditionally not reviewable, *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967), but are also veiled from public and judicial scrutiny by Section 4(b) of the 1975 amendments to the Voting Rights Act. 42 U.S.C. 1973b(b). That this Court upheld the constitutionality of that section as well, offers little encouragement. *Briscoe* v. *Bell,* 432 U.S. 404, 412 (1977). *See also Morris* v. *Gressette,* 432 U.S. at 504-505 ("Since judicial review of the Attorney General's actions would unavoidably extend this [preclearance] period, it is necessarily precluded."). The sole alternative to this discouraging administrative process is to plunge once again into litigation, excessively costly to every jurisdiction in every way.

Despite the prayer of appellants in this case, supplemented by the urging of the State of Mississippi as *amicus curiae*, to persuade this Court to depart from previous decisions under federal statutory execution of a vital Amendment to the nation's Charter, these prayers are made not in derogation of, but rather in faithful defense of, the basic doctrines of participatory

[11] Earlier, Mr. Justice Black had foreseen that if the States and their subdivisions were to be required to get distant Federal preclearance in the Department of Justice, that other laws on different subjects can force the States to seek the advance approval not only of the Attorney General "but [also] of . . . any other chosen members of his staff." *South Carolina* v. *Katzenbach,* 383 U.S. at 360.

democracy under our federal system. As then-Solicitor General Stanley Reed observed, "No responsible official, jurist or statesman, has ever suggested that an effort should be made to ask reconsideration of the doctrine of dual sovereignty, separation of powers, or the supremacy of the federal Constitution." Reed, Stare Decisis and Constitutional Law, 35 PA. BAR ASSN. Q. 131, 139-140 (1938). Through these briefs, the City of Rome and the State of Mississippi seek to integrate and strengthen the symbiotic partnership of the basic component elements of our State and Federal Governments. These intonements are therefore made in obeisance to the paramount order of the Constitution. This Court is no stranger to the fact that a statute, seemingly innocuous, or even beneficial, on its face, may result in an unconstitutionality of the most pernicious sort, as applied. That concept is one against which this Court has traditionally been vigilant. "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373-374 (1886).

III. This Court Should Exercise Its Inherent Authority To Depart From The Doctrine Of *Stare Decisis* And Overrule Precedent In This Case.

Since its initial ruling on Section 5 in *Georgia* v. *United States,* 411 U.S. 526 (1973), this Court has felt itself bound under the doctrine of *stare decisis et non quieta movere* ("adhere to prior decisions and do not

disturb settled points"). By its very nature, however, and certainly cognitive of the mass of litigation springing from its operation, Section 5 of the Voting Rights Act is *not* a settled issue. In the past, the admonition of Mr. Justice Brandeis has been urged upon the Court to the effect that, "*Stare decisis* is usually the wise policy because in most matters it is more important that the applicable rule of law be settled than it be settled right." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1931) (Brandeis, J., dissenting). Of course, ideally, the converse rule should be applied as it has been traditionally by this Court. "It is more important that the Court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations." *Barden* v. *Northern Pacific Railroad,* 154 U.S. 282, 322 (1893). Otherwise the doctrine would tend to persuade judges "to let bad enough alone." R. Traynor, The Limits of Judicial Creativity, 29 HAST. L. J. 1025, 1035 (1978).

The State of Mississippi thus urges this Honorable Court to be as liberal in *reappraising* the applicability of Section 5 of the Voting Rights Act as was Chief Justice Warren in speaking for the Court in *South Carolina* v. *Katzenbach,* when he acknowledged the "inventive manner," 383 U.S. at 327, of its enactment and conceded "the possibility of over-breadth" in the Act's provisions. *Id.* at 331. *See also* his language in *Allen* v. *Board of Elections,* 393 U.S. 544, 566 (1969). As Mr. Justice Frankfurter observed, "Legal doctrines are not self-generated abstract categories .... [T]hey have a specific judicial origin and etiology. They derive meaning and content from circumstances that gave rise to them and from the purpose they were

designed to serve." *Reid* v. *Covert,* 354 U.S. 1, 50 (1957) (Frankfurter, J., concurring).[12]

This capacity for constitutional change in an organic document was comprehended by Justice Douglas who observed that "*stare decisis* must give way before the dynamic component of history." W. Douglas, Stare Decisis, 49 COLUM. L. REV. 735, 737 (1949). The alternative, he said, "is to let the Constitution freeze in the pattern which one generation gave it." *Id.*

In the thirteen years since the upholding of the initial version of the Voting Rights Act, the interpretation of what was constitutionally necessary during chaotic and critical decades of American history may no longer be deemed requisite. Accommodation might be made for constitutional observance of changing mores and institutions in American life. As one constitutional scholar observed,

> Particular constitutional principles or certain applications thereof may be correct for one period of our development and yet incorrect for a future era. It is true that certain clauses of the Constitution may have a fixed, technical meaning that is susceptible of only one correct interpretation. However, most of the significant clauses speak only in generalities whose substance and importance vary with the course of history. J. Noland, Stare Decisis and the Overruling of Constitutional Deci-

[12] Thus the Court has most recently reiterated that "'*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder and verified by experience." *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 58, n. 30 (1977). *Cf. Helvering* v. *Hallock,* 309 U.S. 106, 119 (1940).

sions in the Warren Years, 4 VALP. L. REV. 101, 104-105 (1969). *See also Springer* v. *Philippine Islands*, 277 U.S. 189, 209-210 (1928).

Mr. Justice Jackson also found that "individual study of [a decision's] background and antecedents, its draftsmanship and effects" are mandatory. R. Jackson, Decisional Law and Stare Decisis, 30 A.B.A.J. 334, 335 (1944). Chief Justice Roger Traynor was of a similar view, counseling that precedents "first [be] analyze[d] exhaustively . . . , particularly in the context of possibly equally strong competing claims . . . ." 29 HAST. L. J. at 1040.

Because of the viability of our Constitution, rulings on constitutional law in particular simply do not lend themselves the Talmudic permanence of transcendental morality. As Mr. Justice Cardozo noted, "The doctrine of *stare decisis*, however appropriate and even necessary at times, has only a limited application in the field of constitutional law." *St. Joseph's Stock Yards Co.* v. *United States*, 298 U.S. 38, 94 (1936). *See also James* v. *United States*, 366 U.S. 213, 222 (1960) (Black and Douglas, J.J., separate opinion); *Green* v. *United States*, 356 U.S. 165, 193 (1957) (Black, J., Warren, C.J., and Douglas, J., separate opinion); and *Glidden Co.* v. *Zdanock*, 370 U.S. 530, 541 (1962) (Harlan, Brennan, and Stewart, J.J., separate opinion). Indeed, in a landmark case of reversal, Mr. Justice Bradley, concurring, found that,

> Where the decision is recent, and is only made by a bare majority of the Court, and during a time of public excitement on the subject, when the question has largely entered into political discussions of the day, I consider it our right and duty to subject it to a further examination, if a majority of the Court are dissatisfied with a former decision. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 569-570 (1871).

The modern and traditional argument, therefore, with regard to previous decisions under the Voting Rights Act, that reversal of any one or more of them would have unsettling constitutional, political, and social effects, cannot withstand close scrutiny in light of the history of the Court and the nation. This would especially be the case if this Honorable Court could be persuaded, at long last, to take judicial notice of the changed and changing conditions in those jurisdictions covered by the Voting Rights Act itself. The State of Mississippi and the City of Rome, therefore, endeavor through these briefs to impress upon the Court the resultant inappropriateness under the Constitution of continued adherence to Section 5 of the Voting Rights Act.

CONCLUSION

For these reasons, therefore, the decision of the United States District Court below should be reversed.

Respectfully submitted.

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